THE PUBLIC LAWYER
AUGUST 2, 2004

PUBLIC LAWYERS SECTION SEMINAR

AUGUST 18 in RENO, National Judicial College, Room 105
AUGUST 19 in LAS VEGAS, Federal Courthouse

9 a.m.-12.:15 p.m. 3 CLE Hours–$75 for Public Lawyers members

In Reno, Maddy Shipman, Washoe County Assistant District Attorney, will review and update current and future planning and zoning issues and cases of interest to public lawyers. If you want to hear what's going on in planning or zoning in Nevada and elsewhere or to throw out questions and ideas for an informed response, Maddy is the attorney to ask.

In Las Vegas, Mary Bochanis, Project Attorney for the Southern Nevada Water Authority, will be discussing alternatives to legislatively restricted bidding processes – specifically, the use of design-build in construction projects. Since design-build has recently become available to all governmental levels, this is the chance to discuss the process with the attorney for over $2 billion of construction projects.

In both Las Vegas and Reno, we will be delving into the maze of electronic records and the public sector. Teri Mark, State Records Manager, James Ellisor, Information Systems Director, Las Vegas Valley Water District, James Taylor, Assistant Counsel, Las Vegas Valley Water District, and Brian Chally, Douglas County Chief Civil Deputy, will present a roundtable discussion on electronic record retention, preservation, and discovery requirements and related questions (*e.g.*, what if electronic records are destroyed?; how much and how difficult is it to store millions of emails?; what should be in your policy?).

Welcome New York Times (and Wonkette) readers

Yesterday John Tierney in the New York Times quoted me calculating that the $2.4 million that the Democrats paid for general liability insurance for their four-day convention amounted to roughly $500 per delegate/alternate, or about $120 per day apiece. My suggested line for Sen. John Edwards's acceptance speech: "I'm worth it." (John Tierney and Sheryl Gay Stolberg, "Rehabilitating the L-Word", New York Times, Jul. 29). For more on the Democrats' insurance bill (they paid an extra $86,000, on top of the $2.4 million, to add terrorism coverage), see "Democrats' Insurance Coverage To Top $2.6m For Convention", Bestwire (A.M. Best & Co.), Jul. 12. Posted by Walter Olson at 09:08 AM
|www.overlawyered.com

This Land is Our Land, but the Song Isn't

JibJab, creator of that popular This Land Is Your Land political parody has been warned that they are

infringing on Woody Guthrie's copyright. As the Wired story notes, this action is the antithesis of the spirit of Woody Guthrie, who had this to say about copyrights:

> This song is copyrighted in U.S., under Seal of Copyright #154085, for a period of 28 years, and anybody caught singin it without our permission, will be mighty good friends of ourn, cause we don't give a dern. Publish it. Write it. Sing it. Swing to it. Yodel it. We wrote it, that's all we wanted to do.

Posted by MedPundit at 10:21 AM | www.overlawyered.com

NEVADA CASES

http://www.leg.state.nv.us/scd/OpinionListPage.cfm

State v. Williams, 120 Nev. Adv. Op. No. 52 (July 22, 2004). "The State of Nevada appeals from the district court's grant of a post-conviction petition for a writ of habeas corpus to respondent Jessica Williams. The State argued that Williams' petition was procedurally barred since Williams' claim that marijuana metabolite, carboxylic acid, is not a prohibited substance pursuant to NRS 484.379 should have been raised at trial or on direct appeal.

We agree and conclude that the district court erroneously granted Williams' petition. Williams did not establish good cause for failing to raise the claim at trial or on direct appeal. Additionally, Williams was unable to establish actual prejudice because the plain language of NRS 484.379 clearly includes marijuana metabolite as a prohibited substance."

Heller v. Legislature of the State of Nevada, 120 Nev. Adv. Op. No. 51 (July 14, 2004). "In this original mandamus proceeding, the Secretary of State challenges state government employees' service in the Legislature as violating the Nevada Constitution's separation of powers. The Secretary also questions whether local government employees may serve as legislators without violating separation of powers.

Ironically, the Secretary's attempt to have state executive branch employees ousted or excluded from the Legislature is barred by the same doctrine he relies on–separation of powers. The Nevada Constitution expressly reserves to the Senate and Assembly the authority to judge their members' qualifications. Nearly every state court to have confronted the issue of dual service in the legislature has found the issue unreachable because a constitutional reservation similar to Nevada's created an insurmountable separation-of-powers barrier. Thus, by asking us to declare that dual service violates separation of powers, the Secretary urges our own violation of separation of powers. We necessarily decline this invitation.

Additionally, significant procedural defects plague the Secretary's petition for mandamus relief. Specifically, the Secretary lacks standing to seek any type of relief forcing the Legislature to take action on its members' qualifications, this matter is not ripe for review, and the Secretary has sued the wrong party. Further, quo warranto, rather than mandamus, is the appropriate vehicle by which to challenge a legislator's title to public office.

Accordingly, the Secretary's petition must be denied."

Divison of Child and Family Servs. v. Eighth Judicial Dist. Court, 120 Nev. Adv. Op. No. 50 (July 12, 2004). "This case involves the temporary placement of a fourteen-year-old foster child in a psychiatric treatment facility. The district court orally ordered petitioner, the Division of Child and Family Services (DCFS), to release the child from the facility. Because the DCFS did not immediately comply with the order, the district court orally held the DCFS in contempt and imposed sanctions. The two issues the DCFS raises in this writ petition are whether the district

court had jurisdiction to order the child's release and whether the district court's release order was unclear and ambiguous.~ We ordered the parties to submit supplemental briefing on the issue of whether an order of the court that has not been reduced to writing and filed with the court clerk is effective and enforceable.

We conclude that although the district court had jurisdiction to order the child's release, the district court's oral orders had to be written, signed, and filed before they became effective. Dispositional orders that are unrelated to administrative procedure and case management, and that have not been signed and filed, are ineffective and cannot serve as a basis for contempt. Consequently, the district court had no authority to hold the DCFS in contempt for violating its release order, and its contempt order was ineffective. Because we conclude that the district court's oral orders were ineffective, we need not address the DCFS' contention that the district court's contempt order was unclear and ambiguous."

Flynn v. Flynn, 120 Nev. Adv. Op. No. 49 (July 12, 2004). "In June 2003, the district court denied appellant Terri Flynn's motion to relocate with the parties' eleven-year-old child to California and also denied the change of custody motion brought by respondent Tim Flynn. Although Tim and Terri have joint legal custody of their minor child, Terri has primary physical custody. She brought the relocation motion so that she could move to California for a two-year period to obtain an associate's degree in theology. Terri had no other purpose for the move.

Finding that the move would not serve the minor child's best interest, the district court denied Terri's motion to relocate. Terri appeals the district court's order, arguing that the district court erred by applying the factors outlined in Schwartz v. Schwartz because Terri was not changing her domicile. Terri also argues that even if the Schwartz factors apply, the district court abused its discretion in denying her relocation motion. We disagree and affirm the judgment of the district court."

In re Parental Rights of D.R.H., T.V.G. and C.A.G., 120 Nev. Adv. Op. No. 48 (July 12, 2004). "On appeal, Vincent argues that NRS 128.109(2) is unconstitutional as it infringes on his substantive due process rights. This statute establishes a presumption that children who have been placed outside of their homes for fourteen of twenty consecutive months have their best interest served by parental termination. Additionally, both parents argue that clear and convincing evidence did not support the district court's termination of their parental rights and that termination of their rights was not in the children's best interest.~ We conclude that NRS 128.109(2) is constitutional and that substantial evidence supports the district court's decision to terminate Cristan's and Vincent's parental rights."

Allred v. State, 120 Nev. Adv. Op. No. 47 (July 12, 2004). "Following a 2-day trial, a jury unanimously convicted appellant Christopher Allred of one count of battery with substantial bodily harm. The district court imposed on Allred the maximum sentence of 60 months with the possibility of parole after 24 months.

Allred appeals, contending that (1) due to a clerical error, two erroneous written jury instructions were allowed into the jury's deliberations; (2) the court denied Allred a fair trial because jurors questioned the witnesses; (3) the district court denied Allred due process because the prosecutor commented on Allred's failure to testify; (4) there was insufficient evidence for the jury to convict him; and (5) the sentence imposed by the district court constitutes cruel and unusual punishment.

The district court's clerical error in allowing the two erroneous jury instructions into the jury's deliberations was harmless. Under *Flores v. State*,

the district court did not err in allowing jurors to present written questions to the witnesses after the court approved those questions. The prosecutor did not comment on Allred's failure to testify. Additionally, the State presented sufficient evidence at trial for a jury to convict Allred. Finally, Allred was not prejudiced by the prosecutor's recommendation of a 62-month prison sentence and the sentence imposed was not based on impalpable or highly suspect evidence and does not constitute cruel and unusual punishment. We, therefore, affirm the district court's judgment.

Economic boost does little to stimulate wage increases

Employees should not anticipate larger pay raises this year, says Mercer Human Resource Consulting.

Despite signs of a rebounding economy, pay increases are expected to average 3.3% in 2004 - the same rate as last year - according to the consulting firm's 2004/2005 U.S. Compensation Planning Survey, which includes responses from some 1,600 firms and reflects salary trend data for nearly 14 million workers.

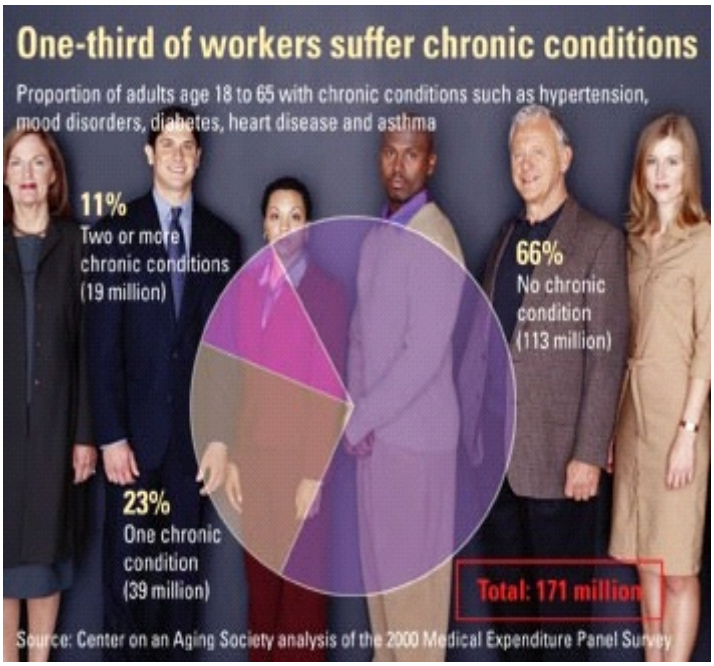
Fewer employers said they expect to freeze pay levels this year; just 5% want to hold the line, down from 12% in 2003 and 16% in 2002. Executives are most likely to have their pay frozen in 2004.

“The year 2005 will mark the fourth consecutive year that pay increases have averaged less than 4.0%,” says Steven Gross, leader of Mercer's U.S. compensation consulting practice. “Employers are seeing some signs of an improved economy this year, but they're not ready to commit to higher pay increases yet.”

Rising benefit costs, particularly for health care, do not significantly factor into the trend of stagnant compensation, says Gross, who points to the labor market as the driving force.
www.benefitnews.com

Quick Poll

July 13, 2003
Does your organization give employees access to Lexis Nexis or other special databases?
76%: No.
14%: I don't know.
10%: Yes.
www.benefitnews.com



Litigation Support: E-filing Primer

By Honora Wade

Almost all legal practices (litigation, criminal or corporate) will be affected by e-filing. But what exactly is e-filing? It varies from one court or agency to the next, and that can be confusing when your staff tries to transfer its experience working

with one to another.

There are three basic components to e-filing: 1) uploading documents; 2) creating an online docket; 3) e-serving interested parties.

Federal district courts have been at the forefront of the e-filing movement, and many jurisdictions have structured their processes to accomplish all of the above. Other state and local courts are beginning to follow suit, however some of the smaller courts systems limit their goal (at least for now) to electronic uploading of files. These courts continue to docket internally with service processed in traditional paper format.

Easing Into the Process

For most courts/agencies, e-filing efforts begin with a pilot project. Then e-filing becomes voluntary. This can be the most challenging time as firms straddle two worlds (some parties e-filing, as others continue to rely on paper-based procedures). Some agencies offer indirect "carrots" to tempt you (i.e., you get an earlier filed date if you e-file rather than submit paper). Often, within a year or so of launching a voluntary program, e-filing becomes mandatory with that court or agency.

New Formats

PDF is by far the most common format for e-filing of documents, for now. XML technology is the likely wave of the future. So begin exploring and understanding that technology as well — it may have a significant impact on your firm's long-term technology choices.

For the short-term, however, ensure your staff has a good understanding of PDF technology. For certain practices, other file formats will loom large — for example, your trademark practitioners rely on jpegs. Be sure your staff has the resources to manage these demands.

Training

When they first launch e-filing, courts or agencies may provide training. But consider the logistics — if you file in a court or agency across the country, you may never get that entity's specific training. Frankly, their training can only address the "middle of the process." Each firm must create internal procedures and protocols for the beginning and end of the process (courts and agencies cannot effectively address the range of workflow from solo practitioners to megafirms).

So, before you can even go to the court/agency's Web site, what technology will you use to convert documents to PDF? What procedures will you follow after the e-filing process (e.g., ensuring the staff prints the confirmation of e-filing [essentially, your conformed copy] and routing it to the client's file?)

Here are some questions that can help you establish protocols:

- Can this court or agency handle money online? If not, certain types of filings will continue to be handled in a traditional fashion (e.g., complaints).

- What is a "signature?" Some courts consider the act of logging into the site as the signature. This will limit access to those who can have a court logon (that may be only attorneys). True digital signatures (involving public/private keys) are not really a factor. How will this impact internal workflow? Will most attorneys e-file themselves, or will staff do this for them? What if the attorney is out of the office? Should someone maintain a list of all attorney logons/passwords?

- What is "end of day" (deadline)? The traditional workday is no longer the standard. Many courts/agencies allow e-filing up until 11:59 pm. You may need staff support beyond traditional business hours. Remember time zone differences.

- Are there special tech requirements? There may be size limits on PDFs and/or a requirement that they be text-searchable. Graphics may have pixel or dots-per-inch maximums.

● Are multiple formats needed? Many courts require an editable electronic version of materials a judge or agency may wish to revise. You may be required to e-mail a WordPerfect, Word or RTF version of proposed orders to the judge (in addition to the PDF that was e-filed).

● If e-service is included, how does back-up notification work? Many courts/agencies try to build this into their process by allowing all logons to have back-up people notified when e-service occurs. That way, if the attorney is out, the e-service doesn't languish unnoticed.

● Stay alert. Each court or agency will continue to refine the process to better serve them and you. Keep a close eye on their Web site.

At first, e-filing may feel more time-consuming, but as you become practiced in an agency's or court's procedures, it quickly becomes second nature.
www.lawtechnologynews.com

NINTH CIRCUIT CASES

(Ninth Circuit cases can be found at http://www.ca9.uscourts.gov/ca9/neopinions.nsf)

Dennis v. Budge, No. 04-00093 (9th Cir. July 30, 2004). "Karla Butko, a lawyer, appeals the district court's denial of her petition for writ of habeas corpus filed on behalf of her former client, Terry dennis, a Nevada state prisoner, who is scheduled to be executed on August 12, 2004. She also asks for a stay of execution.

The district court held that Butko lacks standing as Dennis's 'next friend' and, consequently, dismissed the habeas petiiton. The district court also denied motions to proceed in former pauperis, for appointment of counsel, and for stay of execution. The district court granted a Certifiicate of Appealability. We heard argument by telephone, and affirm dismissal of the petition. As Butko lacks standing, we also lack jurisdiction to stay the execution."

Werft v. Desert Annual Southwest Conference, No. 03-15545 (9th Cir. July 30, 2004). "We must decide whether the claim of a minister, seeking damages from his church for employment discrimination based on a failure to accommodate his disabilities, falls within either the ministerial exception first articulated in *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972), or the theory of *Bollard v. California Province of the Society of Jesus*, 196 F.3d 940 (9th Cir. 1999) (sexual harassment claims fall outside ministerial exception).

The ministerial exception applies to Werft's claims; thus the Free Exercise Clause of the First Amendment bars this suit. The district court properly granted the Church's motion to dismiss."

Parents Involved In Community Schools v. Seatlle School Dist. No. 1, No. 01-35450 (9th Cir. July 27, 2004). "Following the Washington Supreme Court's resolution of certified state-law questions, we must decide whether the use of race in determining which students will be admitted to oversubscribed high schools in Seattle, Washington violates th federal Constitution's Equal Protection Clause. This opinion marks the fourth time a federal court has addressed the Seattle Public Schools' use of an explicit racial tiebreaker' in choosing which student applicants it will admit to the City's most popular public high schools.

Having accepted the School District's invocation of Grutter and Gratz in support of the proposition that racial and ethnic diversity can generate constitutionally compelling benefits within the educational setting itself and our society at large, we ultimately are compelled to reject the School District's strained efforts both to eat its cake and have it too. Its racial tiebreaker—though enlisted in the service of admittedly worthy

ends—plainly fails the narrow tailoring component of the Constitution's strict scrutiny test."

United States v. Grubbs, No. 03-10311 (9th Cir. July 26, 2004). "Jeffrey Grubbs appeals following his conditional guilty plea on a charge of receiving a visual depiction of a minor engaged in sexually explicit conduct. 18 U.S.C. § 2252(a)(2). He contends that the district court should have granted his motion to suppress evidence, including his statements, because the anticipatory search warrant that authorized the search of his premises was invalid under the Fourth Amendment.

To resolve Grubbs' claim, we must determine whether a facially defective anticipatory search warrant may be cured by information contained within an affidavit when that affidavit is not presented to the person or persons whose property is to be searched. We answer that question in the negative, and hold that the search of Grubbs' premises violated the Fourth Amendment."

United States v. Ray, No. 03-30339 (9th Cir. July 23, 2004), "In this case, the functions of our three branches of government intersect at a novel point. The United States District Court for the District of Montana issued Standing Order No. DWM-28. The Standing Order directed the United States Attorney, within 20 days after sentencing occurs in each criminal case, to assemble and file with the court clerk a report of sentence. The court clerk was to send these reports to the United States Sentencing Commission, in order to satisfy a reporting requirement that Congress has imposed on the courts. We are asked to decide whether the district court exceeded its statutory or inherent authority, or the limits of the Constitution, by issuing the Standing Order.

These questions have divided our panel. Judge Clifton joins in Sections I, II, and III of Judge Graber's opinion. Judge Brewster joins in Sections I, III, and IV of Judge Graber's opinion. Thus, we are unanimous as to Sections I and III, while two judges agree on Sections II and IV. As a result, a majority of our panel concludes that the district court acted within the scope of its statutory and inherent authority when issuing the Standing Order and that the Standing Order did not violate the constitutional doctrine of separation of powers. The Standing Order thus remains in effect."

Elvig v. Calvin Presbytrian Church, No. 02-35805 (9th Cir. July 23, 2004). "Plaintiff Monica L. McDowell Elvig, an ordained Presbyterian minister, brought claims under Title VII against her employer Calvin Presbyterian Church, North Puget Sound Presbytery and her supervisor Pastor Will Ackles, alleging that she was sexually harassed and retaliated against by the Defendants.

The district court dismissed Elvig's complaint, concluding that her Title VII claims fell within the scope of the so-called 'ministerial exception' to Title VII. This exception saves Title VII from unconstitutionality under the First Amendment by requiring that Title VII suits be dismissed when they would impermissibly encroach upon the free exercise rights of churches or excessively entangle government and religion. Applying our decision in *Bollard v. California Province of the Society of Jesus*, 196 F.3d 940 (9th Cir. 1999), we reverse and remand.

Under the ministerial exception, a church's decisions about whom to employ as a minister are protected by the First Amendment. Thus to the extent Elvig's sexual harassment and retaliation claims implicate the Church's ministerial employment decisions, those claims are foreclosed. Nonetheless, Elvig has stated narrower and thus viable sexual harassment and retaliation claims that do not implicate protected employment decisions. Elvig's sexual harassment claim can succeed if she proves that she suffered a hostile work

environment and if the Defendants do not prove that Elvig unreasonably failed to take advantage of available measures to prevent and correct that hostile environment. Elvig's retaliation claim can succeed if she proves that she suffered retaliatory harassment — here, in the form of verbal abuse and intimidation — because of her complaints to the Church and the U.S. Equal Employment Opportunity Commission. Should the Church be found liable on either of these claims, Elvig may recover damages for consequent emotional distress and reputational harm. Within this framework, Elvig's Title VII suit can provide her with redress for sexual harassment and retaliation without attaching liability to ministerial employment decisions protected by the First Amendment."

United States v. Granbois, No. 03-30383 (9th Cir. July 22, 2004). "In this appeal we hold that a prior conviction for abusive sexual contact under 18 U.S.C. § 2244(a)(3) constitutes a conviction of a 'crime of violence' for purposes of the Career Offender Guideline, U.S.S.G. § 4B1.1. Accordingly, we affirm the appellant Bryan Granbois's sentence."

United States v. Del Toro Gudino, No. 03-30023 (9th Cir. July 22, 2004). "The issue in this case is whether a criminal defendant's identity must be suppressed when it was disclosed as a result of an unconstitutional stop.

Although the rule that identity evidence is not suppressible is not limited to § 1326 cases, its practical force is particularly great in this context. If a defendant's identity may be suppressed, the moment the court lets him go, he is immediately committing the continuing violation of being present in the United States after having been deported. This is the problem the Court found compelling in Lopez-Mendoza, when it noted that '[t]he constable's blunder may allow the criminal to go free, but we have never suggested that it allows the criminal to continue in the commission of an ongoing crime.'"

Gaggan v. Sharrar, No. 02-15449 (9th Cir. July 22, 2004). "This case concerns execution in a community property state of a judgment obtained in a common law state.

We conclude that, consistent with Arizona law, a federal judgment from a district other than the District of Arizona, registered under § 1963, in which only one spouse was named in the underlying action, may nevertheless be executed on the community property of both spouses, in Arizona, if the judgment is for a community obligation, despite failure to name the other spouse in the action filed outside Arizona.

Gagan could not have joined LaJunta in his RICO action because, according to the facts we are presented with, she was not involved in the scheme for which her husband was found liable."

United States v. Ameline, No. 02-30326 (9th Cir. July 21, 2004). "Alfred Ameline appeals his 150 month sentence that was imposed after he pled guilty to knowingly conspiring to distribute methamphetamine in violation of 21 U.S.C. §§ 841(a)(1) and 846. In his initial appellate brief, Ameline challenged his sentence on two grounds. First, Ameline contended that because he objected to the amount of methamphetamine attributed to him in the Presentence Report the district court erred when it considered the PSR as 'prima facie evidence of the facts' and required Ameline to disprove its contents relating to drug quantities. Second, Ameline contended that the district court's drug quantity finding was clearly erroneous because it was based on multiple layers of unreliable hearsay evidence.

In post-submission briefing, Ameline argued that the imposition of his sentence violates the Sixth Amendment as recently interpreted by the Supreme Court in *Blakely v. Washington*, 124 S.Ct. 2531 (2004) because the facts underlying the

calculation of his base offense level and his sentence enhancement were not found by a jury beyond a reasonable doubt. If Ameline is correct that the *Blakely* rule applies to the United States Sentencing Guidelines, his other two claims become irrelevant, as they assume both the wrong decision-maker and the wrong standard of proof. We examine *sua sponte* whether the Blakely rule applies to sentences imposed under the Sentencing Guidelines. We hold that Blakely's definition of statutory maximum applies to the determination of the base offense presumptive ranges under § 2D1.1(c) of the Sentencing Guidelines, as well as the determination of the applicability of an upward enhancement under § 2D1.1(b)(1).

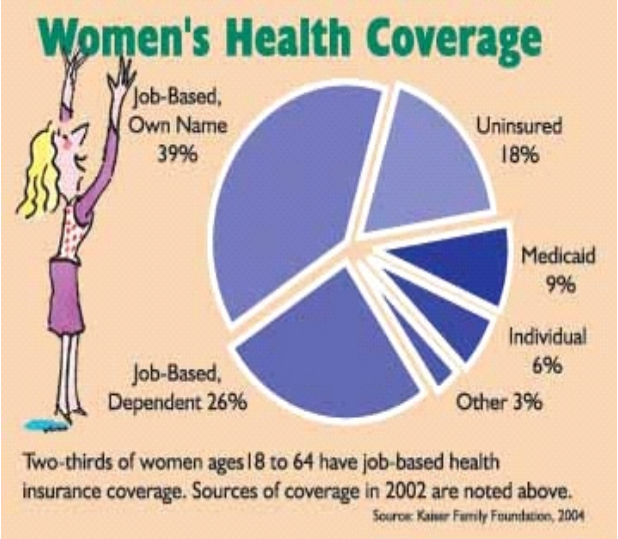
As a result, we hold that Ameline's sentence, based on the district court's finding by a preponderance of the evidence of 1,603.60 grams of methamphetamine—despite Ameline's admission of only a detectable amount of methamphetamine—violates Ameline's Sixth Amendment right to a jury trial.

Because we may *sua sponte* review an issue based on a change in the law by the Supreme Court, we hold that we may properly review Ameline's *Blakely* claim and conclude, regardless of whether we apply the harmless or plain error standard, that the district court violated Ameline's right to have the facts underlying his sentence found beyond a reasonable doubt. Finally, we hold that the *Blakely* rule's effect on the determination of a base offense level under § 2D1.1(c) and an upward enhancement under § 2D1.1(b)(1) do not render the Sentencing Guidelines facially invalid. Accordingly, we vacate Ameline's sentence and remand for resentencing."

United States v. Bucher, No. 03-10197 (9th Cir. July 20, 2004). "A police officer comes to a mother's home to arrest her son. He isn't there. She later notifies the son that police want to arrest him. Should she be guilty of anything other than possibly loving a son who may not deserve it? What about a motorist who warns other motorists that they are entering a police 'speed trap'? The price will prove extremely high if reasonable human conduct becomes criminal. However, the line between reasonable conduct and conduct that interferes with the performance of official conduct must be drawn.

Gabriel Bucher recognizes that he failed to obey a national park ranger's command that he leave a National Park trail and that a regulation made such conduct unlawful. He vigorously contends that he did nothing to 'interfere' with the rangers in
the exercise of their duties, and that he was wrongly charged with violating 36 C.F.R. § 2.32(a)(1)(2000). His confusion is understandable, but also misplaced. By walking down the trail to warn a person whom the rangers intended to arrest, he did interfere with both the rangers and their official duties."

United States v. Rivera-Guerrero, No. 04-50115 (9th Cir. July 20, 2004). "On February 19, 2004, a magistrate judge entered an order authorizing the involuntary administration of medication to Abisai Rivera-Guerrero, for the purpose of making Rivera competent to stand trial. On March 10, 2004, the district court denied Rivera's motion to reconsider the magistrate judge's decision. Rivera appeals the district court's decision, arguing that the magistrate judge lacked authority to issue the final order and that, on the merits, the order violated his constitutional rights. We do not reach the merits because we hold that the magistrate judge did lack authority to issue the final order. Accordingly, we vacate the district court's order and remand for further proceedings consistent with this opinion."



Squaw Valley Dev. Co. v. Goldberg, No. 02-17346 (9th Cir. July 20, 2004). "Squaw Valley Development Company, Squaw Valley Ski Corporation and Squaw Valley Preserve filed this action under 42 U.S.C. § 1983, alleging that two employees of the California Regional Water Quality Control Board, Lahontan Region subjected them to selective and over-zealous regulatory oversight in violation of their constitutional rights to equal protection and substantive due process. The district court granted summary judgment in favor of the employees, Harold Singer and Martin Goldberg, on the ground that they are entitled to qualified immunity because there is no triable issue of material fact that a constitutional violation had been committed. Because Squaw Valley presented evidence that Singer may have been motivated by personal animus, we reverse the grant of summary judgment as to Squaw Valley's 'class of one' equal protection claim against Singer, but affirm on the remaining claims."

Bruce v. Terhune, No. 02-16992 (9th Cir. July 19, 2004). "In this appeal from the denial of a petition for a writ of habeas corpus arising out of a prosecution for lewd and lascivious conduct with a child, we must decide whether the state court unreasonably applied clearly established Federal law on burden of proof and whether sufficient evidence exists to support the conviction.

In sum, our review of the entire record has revealed nothing to cast doubt on the jury's verdict. Because a rational trier of fact could have been persuaded beyond a reasonable doubt that Bruce was guilty of lewd and lascivious conduct with a child, habeas relief is unwarranted."

Maduka v. Sunrise Hospital, No. 03-15332 (9th Cir. july 15, 2004). "We review a Rule 12(b)(6) dismissal for failure to state a claim de novo, and accept as true all well-pleaded allegations of fact in the Complaint, construing them in the light most favorable to *Maduka. Roe v. City of San Diego*, 356 F.3d 1108, 1111-12 (9th Cir. 2004). Dismissal 'is appropriate if itappears beyond doubt that [Maduka] can prove no set of facts in support of his claim which would entitle him to relief.' *Id*. at 1112 Nearly a year before the district court's dismissal, the Supreme Court determined the pleading standards appropriate for complaints alleging employment discrimination. *See Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002). Presented with 'the question whether a complaint in an employment discrimination lawsuit must contain specific facts establishing a prima facie case of discrimination under the framework set forth by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), the Court held "that an employment discrimination complaint need not include such facts and instead must contain only "a short and plain statement of theclaim showing that the pleader is entitled to relief."' *Id*. at 508, quoting Fed. R. Civ. P. 8(a)(2)."

Cashman v. City of Cotati, No. 03-15066 (9th Cir. July 15, 2004). Appellants Gene Cashman and Athena Sutsos, both mobilehome park owners, allege that the rent control ordinance dopted by appellee City of Cotati, California effects a regulatory taking in violation of the Fifth and Fourteenth Amendments to the United States

Constitution. After granting their motion for summary judgment and entering judgment, the district court amended then vacated that judgment pursuant to Federal Rules of Civil Procedure 59(e) and 60(b), respectively. The district court conducted a trial and entered judgment for the City. Cashman and Sutsos appeal the district court's orders amending and vacating the original judgment, as well as its findings and conclusions following trial.

We vacate the post-trial judgment and remand to the district court for reinstatement of the original judgment in favor of Cashman and Sutsos."

Cold Mountain v. Garber, No. 03-35474 (9th Cir. July 14, 2004). "We must decide whether the United States Forest Service's issuance of a permit to operate a bison capture facility in Montana violated the Endangered Species Act or the National Environmental Policy Act.

Because the record amply supports the district court's conclusion, we hold that no take in violation of the ESA occurred."

Disabled Rights Action Commitee v. Las Vegas Events, Inc., No. 02-17163 (9th Cir. July 14, 2004). "National Finals Rodeo at a publicly-owned arena in Las Vegas 'operate' the arena during the Rodeo, and so are responsible for assuring compliance with the ADA's public accommodation physical accessibility requirements. The district court thought not. Also at issue is whether the suit can proceed without the participation of the University and Community College System of Nevada (University System), the owner of the arena. The district court ruled that under Rule 19 of the Federal Rules of Civil Procedure, it cannot.

We conclude that under the circumstances here, the private groups staging the Rodeo did 'operate' the publicly-owned facility during the Rodeo and so can be sued under Title III of the ADA for failure to make a place of public accommodation accessible for disabled individuals. We further conclude that University System is not a necessary party under Rule 19."

Sanders v. Woodford, No. 01-99017 (9th Cir. July 8, 2004). "Convicted of murder and sentenced to death, Ronald Sanders appeals the district court's denial of his federal habeas petition, challenging both his conviction and his death sentence.

We hold that the district court correctly rejected Sanders' claim that the jury that convicted him was drawn from a jury venire that unconstitutionally failed to reflect the number of Hispanics in Kern County, where he was tried. We conclude, however, that Sanders did not receive an individualized death sentence, as required by the Eighth Amendment. The California Supreme Court neither independently reweighed aggravating and mitigating sentencing factors after it had invalidated two of the aggravating factors, nor did it conduct an appropriate harmless-error analysis. We also conclude that this error was not harmless. We therefore reverse the district court's denial of Sanders' habeas petition as it relates to the imposition of the death penalty and remand with instructions to grant the petition if the state does not either provide a new penalty trial or replace the sentence of death with another legally appropriate punishment."

United States v. Stephens, No. 03-10359 (9th Cir. July 7, 2004). "Defendant-Appellant Orvial Stephens appeals a restitution order of $84,751.35, entered after he pled guilty to failing to pay a child support obligation in violation of 18 U.S.C. § 228.

We hold that the district court properly required Stephens to pay interest on past-due child support payments and that it correctly calculated the amount of interest. We further hold that the district court correctly concluded that Stephens is required to pay part of the restitution award to the State of Georgia. Finally, we hold that payment should be made by Stephens to the State of

Georgia only after the amount owed to the child's mother under the order is paid in full."

United States v. Matthews, No. 02-10445 (9th Cir. July 7, 2004). "James Earl Matthews appeals his criminal sentence of 120 months' imprisonment, which was imposed in accordance with U.S.S.G. § 2K2.1(a)(2), because the district court determined that his 1987 burglary of an occupied building qualified as a crime of violence under U.S.S.G. § 4B1.2(a)(2). He argues that burglary of an occupied building in Nevada is not a crime of violence according to the United States Sentencing Guidelines, and that the appropriate Guidelines range is therefore 92-115 months."

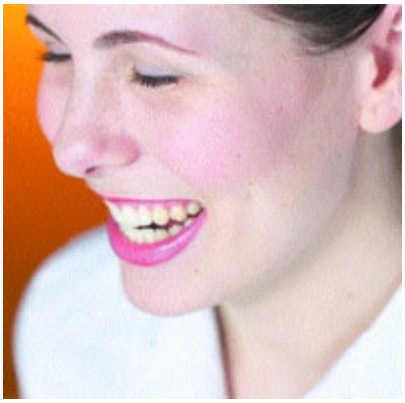
HSAs insufficient for health costs in retirement

Employers should be careful to not oversell the capabilities of health savings accounts to workers. HSAs cannot cover all health expenses in retirement, even if participants save the maximum permissible amount and avoid using the funds to pay for current expenses, the Employee Benefit Research Institute warns. Thus, greater retirement savings in other vehicles, such as IRAs and 401(k)s, is needed.

By contributing the maximum allowed amount and not tapping their funds until retirement, young workers could save $300,000 or more in an HSA during a 40-year career, according to EBRI projections. But that amount won't be adequate to cover health care costs in retirement if medical costs grow significantly faster than the economy. A 55-year-old worker could save $44,000 in an HSA over 10 years, but the worker would need $137,000 to pay for health care, if he or she reaches age 80. 'If the availability of HSAs encourages today's workers to focus on the issue, that will be a constructive step, but merely starting an HSA is no guarantee that a growing problem will be resolved,' says EBRI President Dallas Salisbury. www.benefitnews.com

Web Watch: Laughing at Lawyers and the Law

By Robert J. Ambrogi



Law is serious stuff. But don't tell that to New York lawyer Lawrence Savell, for fear he might abandon his endlessly entertaining site, LawHumor.com, www.lawhumor.com.

Savell dedicates his site "for the proposition that zealous representation of clients and furtherance of the public good can be only enhanced by a healthy willingness to poke fun at ourselves appropriately on occasion." And poke fun he does, through humorous articles, music, comics and even games. Consider, for example, "Law Review: A Love Story," a lawyer love story written in the style of a law review, complete with footnotes. Listen to excerpts from Savell's recording, ""he Lawyer's Holiday Humor Album," featuring songs such as "Santa v. Acme Sleigh" and "Rainmaker Reindeer." Check out Savell's Typo-Man comic book. Play games including "Law Humor Hangman" and "Arrange the Exhibits." You could kill a lot of otherwise billable time at LawHumor.com. But then you'd be missing out on the many other sites devoted to making lawyers laugh – or to laughing at lawyers.

Such as Andrew J. McClurg's Lawhaha.com, www.lawhaha.com. McClurg is a "serious" legal scholar and professor of law at Florida International University College of Law. From 1998 to 2001, he wrote "Harmless Error," a humor column published in the ABA Journal. The column led to a book, The Law School Trip, parodying legal education. The book led to the Web site.

The site is a mix of McClurg's humor writing and actual oddball humor drawn from the truth-is-stranger-than-fiction world of lawyers and law students. Among his writings here are selections from his ABA Journal column and a series called "Who is Suzy Spikes," tracing the ongoing legal struggles of a litigious adolescent girl. From the real world come collections of funny law school moments, weird legal news and strange judicial opinions. Topping it all off are "the world's greatest law review article" and "the universe's best product warning label."

Other Funny Lawyers

A humor writer and self-described recovering lawyer, Madeleine Begun Kane writes articles, song parodies, poems, comics and more about whatever irks her — and, she says, she's easily irked. She covers politics, computers, marriage, cars, work, family, the Internet, the IRS, the news, law, music, money, privacy, technology, Web surfing, media, travel and President Bush, and compiles it all on her Web site, MadKane, www.madkane.com. She has a page of purely legal humor, but don't let it distract you from all the other funny stuff here, particularly her satirical White House dispatches, "Dubya's Dayly Diary."

Sean Carter, a lawyer, stand-up comedian and humor writer, follows the lighter side of legal news though his site, Lawpsided, www.lawpsided.com, culling reports of outrageous crimes, offbeat lawsuits and other legal news and compiling them here. Author of the book, If It Does Not Fit, Must You Acquit? Your Humorous Guide to the Law, Carter focuses on current legal news, singling out the wackiest stories for reporting and commentary.

Dismayed that his search for legal humor on the Web turned up only stale jokes poking fun at lawyers, Ontario lawyer Daniel Strigberger teamed up with his lawyer-father Marcel to create Legal Humour.com, www.legalhumour.com, targeted at legal professionals — without the lawyer jokes. Instead, the Strigbergers offer an emporium of humorous commentary, news reports, courtroom stories and cartoons – and even a somewhat sober essay advocating more humor in law practice.

West Virginia lawyer Bob Noone is known as "the Perry Mason of parody" — or at least thats what he says. A practicing lawyer, he is also a performing musician who has recorded two albums, "Wingtips Optional" and "Chicken Suit for the Lawyer's Soul." At his Web site, Lawsongs, www.lawsongs.com, you can listen to some of his songs, read selected lyrics, see pictures of him performing, order his albums, and read more about his back-up band, the Well Hung Jury.

Law Fun, www.duhaime.org/Law_fun/fun.htm, is part of the Web site of the British Columbia law firm Duhaime & Company. The humor you will find here is on the goofy side, as characterized by the image on its first page of the scales of justice balanced on the arms of Mr. Potatohead. The site includes the requisite collection of law jokes, the dumbest things ever said in court, outrageous lawsuits, and a hodgepodge of "bland" legal humor, described as the "the kind you repeat at social gatherings when the senior partners are present."

Making Fun of Lawyers

The sites so far temper their humor with respect for the profession of law. But not everyone is so fond of lawyers. In fact, you may be surprised to learn that there exists an entire comic genre known as the lawyer joke.

Many of the people who make these jokes appear not to like lawyers very much. For example, at Power of Attorneys, www.power-of-attorneys.com, it was not enough for them to have assembled a wide-ranging collection of lawyer jokes and outrageous lawsuits. They had to go even farther, creating a Lawyers Stink Store, complete with hats, shirts and coffee mugs, and publishing the book, Wake Up and Smell the Lawyers.

A less vindictive approach is taken by the folks at Nolo, whose Lawyer Joke Emporium, www.nolo.com/humor/jokes.cfm, houses a broad-ranging collection of lawyer jokes, categorized under general headings such as Doctors and Lawyers, Lawyers as Money Grubbers and Lawyers in Hell.

One site is so taken with this topic that it has made it its goal to become the largest repository of lawyer jokes on the Web. On a recent visit, Lawyer Jokes, www.lawyer-jokes.us, had so far collected fewer than 100. It also collects lawyer cartoons.

As it turns out, there are lots of Web sites that compile lawyer jokes. No kidding. Here are just some of them:

- AhaJokes.com Lawyer Jokes, www.ahajokes.com/lawyer_jokes.html.
- Attorney Jokes From Snifter, Flute & Stein, www.apc.net/ia/law.htm.
- Comedy Zone Lawyer Jokes, www.comedyzone.net/jokes/lawyer.htm.
- Exlawyer.com, www.exlawyer.com.
- ExpertLaw Lawyer Jokes and Legal Humor, www.expertlaw.com/humor/index.html.
- James Fuqua's Law Jokes, www.jamesfuqua.com/lawjokes.html.
- PondScumAndLawyers.com, http://pondscumandlawyers.com.
- Profession Jokes: Lawyers, www.workjoke.com/projoke40.htm.
- SCROOMtimes Lawyer Jokes, www.scroom.com/SCROOMtimes/Humor/Lawyer.shtml.
- The 'Lectric Law Library's Rubber Room, www.lectlaw.com/rub.html.
- Vas's Lawyer Jokes, www.gigaflop.demon.co.uk/humour/lawyer.htm.

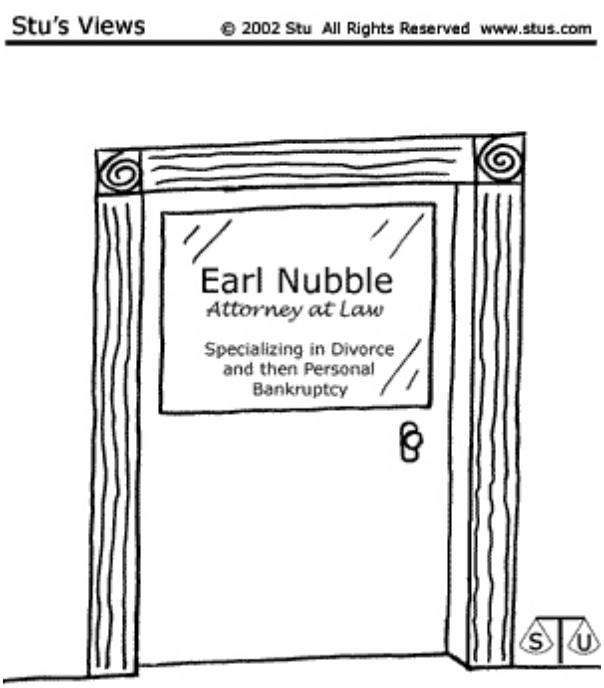
Lawyer Cartoons

Stuart Rees calls himself a lawyer to cartoonists and a cartoonist to lawyers. This San Diego-based, Harvard Law School graduate has a law practice that consists of representing syndicated cartoonists nationwide. He also draws his own cartoon about lawyers and the law, Stu's Views, www.stus.com. You can find Rees' most recent cartoon here, along with an archive of earlier installments. You can also subscribe to receive Stu's Views by e-mail every week.

Rees is not the only Web source of law-related cartoons. Here are some others:

- Cartoon Bank, www.cartoonbank.com, is home to nine decades of New Yorker cartoons, a fair share of which covered lawyers and law.
- DansCartoons.com, www.danscartoons.com/law_cartoons.htm , has this collection of law and legal cartoons drawn by Dan Rosandich.
- Juris, www.juriscomic.com a comic strip that looks at all things law.
- LawComix, www.lawcomix.com, a broad-ranging collection of cartoons by lawyer Charles Pugsley Fincher, whose legal and political cartoons have been widely published.
- Lawtoons, www.lawtoons.com a comic drawn by Suzan F. Charlton, a lawyer in Washington, D.C.
- Mason Darrow, non-profit lawyer, www.masondarrow.com is drawn by Maine-based cartoonist John Klossner, who makes his archives available here.

If we cannot laugh at ourselves, someone once wrote, others will be glad to do it for us. On the Web, there is plenty of both — lawyers laughing at themselves and others laughing at lawyers.



Word of the Day

megrim \MEE-grim\, noun:
1. A migraine.
2. A fancy; a whim.
3. In the plural: lowness of spirits -- often with 'the'.

That might justify her, fairly enough, in being kept away from meeting now and again by headaches, or undefined megrims.
--Harold Frederic, The Damnation of Theron Ware

Tonight, by some megrim of the scheduler, I have the honor of working with the departmental chairman, Dr. B.
--Pamela Grim, Just Here Trying to Save a Few Lives

Word of the Day

eructation \ih-ruhk-TAY-shuhn\, noun:
The act of belching; a belch.

Ignatius belched, the gassy eructations echoing between the walls of the alley.
--John Kennedy Toole, A Confederacy of Dunces

www.dictionary.com